United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7274

To be argued by
NICHOLAS J. HEALY

United States Court of Appeals
For the Second Circuit

BPLS

Docket No. 75-7274

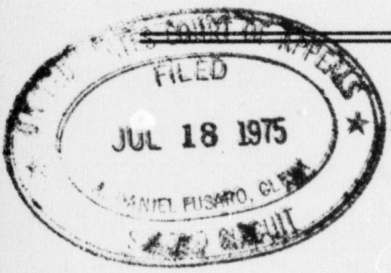
FEDERAL COMMERCE & NAVIGATION COMPANY, LTD.,
Plaintiff-Appellant,

—against—

THE M/V MARATHONIAN, her engines, etc. and EUROPA SHIPPING CORPORATION,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT FEDERAL COMMERCE & NAVIGATION COMPANY, LTD.



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Statement of the Issues Presented for Review

The issues presented for determination by this Court are whether, in dismissing the Complaint herein, the District Court erred 1) in failing to apply modern tort principles which recognize a right of recovery for financial loss to a party—here a time charterer—other than the owner of the property damaged—here the chartered vessel, the M.V. ROLWI—as a result of a negligent act, and 2) in failing to read the allegations of the Complaint as sufficiently broad to encompass negligence of the colliding vessel (the M.V. MARATHONIAN) so gross as to amount to intentional interference with the contractual relations between the chartered vessel's Owner and Appellant, as Charterer.

Statement of the Case

The decision from which this appeal is taken was rendered in an action brought by Appellant Federal Commerce and Navigation Company, Ltd., Time Charterer of the M.V. ROLWI ("Charterer"), against the M.V. MARATHONIAN and her owner, Europa Shipping Corporation ("Europa"), wherein the District Court's admiralty jurisdiction was invoked.

The Complaint alleged that Appellant was the Time Charterer of the ROLWI (later renamed DOBERG); that while the ROLWI was operating under the Time Charter, the MARATHONIAN collided with her in Lake Michigan, causing serious damage, "as a result of which Plaintiff [Appellant] lost the use of the M.V. ROLWI for an extensive period of time"; that the collision was caused "in particular by the operation of the said vessel [MARATHONIAN] at a highly excessive rate of sped in dense fog" (3a-4a*), and that as a result of the collision Appellant sustained damages of approximately $700,000, consisting of the loss of use of the ROLWI, for which Appellant sought recovery.

Europa moved, pursuant to Rule 12(b)(6), F.R. Civ. P., for an order dismissing the Complaint on the ground that it failed to state a claim against Europa and the MARATHONIAN upon which relief could be granted (8a).

On April 8, 1975, the District Court granted the motion and directed the entry of judgment dismissing the Complaint (9a, 24a). Judgment was accordingly entered on April 23, 1975 (24a) and this appeal was taken on May 2, 1975 (25a).

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* References are to pages of the Appendix, unless otherwise indicated.

ARGUMENT

POINT I

The District Court erred in failing to follow modern tort principles recognizing a right of recovery for negligent acts causing financial loss to parties other than the owners of the property damaged as a result of such acts.

The motion to dismiss was granted on the authority of *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303 (1927). In that case a vessel was operating under a time charter containing an "off hire" clause providing that in the event of a breakdown the vessel was to be "off hire" during the time lost. While in drydock the chartered vessel was damaged as a result of the dry dock company's negligence and she lost 14 days in effecting necessary repairs. While the vessel remained off hire during the 14 days, the savings in hire did not make the time charterer whole, as the value of the use of the vessel had risen substantially since the making of the charter. The time charterer therefore sought to hold the dry dock company liable for the profits lost by reason of the delay.

The District Court (Goddard, D.J.) allowed the charterer a recovery on the ground that it had a "property right" in the vessel, even though the charter was admittedly not a demise (bareboat) charter and the shipowner was to remain in possession and control of his vessel during the charter term. 1924 A.M.C. 740 (not officially reported).

On appeal, this Court (Ward, C.J.) disagreed that the time charterer had such a property right, but nevertheless affirmed the District Court's decision on the ground that if the entire loss occasioned by the detention of the vessel were recovered and divided, a part of the recovery would accrue to the time charterer, *i.e.*, that the shipowner would have

been a trustee for the time charterer to the extent of the latter's share in the recovery, and that hence no injustice would result from allowing the time charterer to recover its share in a direct action against the tortfeasor. 13 F. 2d 3.

The Supreme Court, however, reversed, Mr. Justice Holmes stating that "justice does not permit that the [tortfeasor] be charged with the full value of the loss of use unless there is some one who has a claim to it as against the [tortfeasor]." He went on to say that the time charterer had no claim either in contract or in tort and could not acquire a standing to sue by the suggestion that if someone else had recovered he would have been bound to pay over a part of the recovery by reason of his personal relations with the charterer.

In Mr. Justice Holmes' view, the damage to the vessel was not a wrong to the time charterer, but only to the shipowner; the charterer's loss, he said, "arose only through their contract with the owners—and *while intentionally to bring about a breach of contract may give rise to a cause of action* . . ., as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. See *National Sav. Bank* v. *Ward*, 100 U.S. 195. The law does not spread its protection so far".*

Robins does indeed support Europa's position. However, the law of torts has seen many changes since that case was decided nearly half a century ago, and one of the most significant of these is the broadening of the class of persons entitled to protection from the tortious acts of others. As a result of this development *Robins* has fallen into disfavor

* Emphasis throughout has been added.

in this as well as other circuits; in Appellant's submission, it no longer has any vitality and would not be followed by the Supreme Court today.

The District Court agreed with Appellant's position that the doctrine of interference with contract should yield to modern tort theories which rest on familiar principles of negligence and foreseeability. Judge Cannella stated, in the course of his opinion:

> "Indeed, were this Court now free to write upon a *tabula rasa* and not constrained by the weight of precedent, we would reject the negligent interference with contract doctrine in favor of a negligence—causation—foreseeability analysis . . ." (18a).

Moreover, Judge Cannella acknowledged that rejection of the *Robins* rule would be wholly consistent with this Court's observation in *Petition of Kinsman Transit Co.* [*Kinsman II*], 388 F. 2d 821 (2d Cir. 1968), wherein, in Judge Cannella's words, "the Court of Appeals may well [have] consider[ed] *Robins* to have been discarded *sub silentio*. . .". (20a).

In *Kinsman II* a river became blocked by vessels which had negligently been permitted to go adrift. Another vessel, in which grain had been stored, was unable to reach an elevator at which it was to discharge the grain and the grain company was required to purchase grain elsewhere in order to meet a contractual commitment. Still another vessel, which was discharging cargo, was struck by one of the drifting vessels, making it necessary to rent equipment in order to complete the discharge.

The District Court denied the claims on the ground that no recovery should be allowed for negligent interference with the contractual rights of another. The decision was

affirmed, but on grounds of non-foreseeability, rather than negligent intereference with contractual rights, and, as Judge Cannella observed in the present case, "[i]n the course of rejecting these claims on foreseeability grounds, Judge Kaufman cast doubt upon the vitality of the *Robins* holding...". (19a).

In *Kinsman II*, Judge Kaufman stated, at 388 F. 2d 823-824:

> "Judge Burke [the Trial Judge] refused to confirm either the Gillies or the Farr awards made by the Commissioner. He reasoned that the evidence established that the damages to Cargill and Cargo Carriers were caused by negligent interference with their contractual relations. In the absence of proof that the interference was intentional or with knowledge of the existence of the contracts, he concluded recovery could not be grounded in tort. Robins Dry Dock and Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927). We too deny recovery to the claimants, *but on other grounds.*
>
> "We do not encounter difficulty with Judge Burke's analysis because it lacks some support in the case law; instead, we hesitate to accept the 'negligent interference with contract' doctrine *in the absence of satisfactory reasons for differentiating contractual rights from other interests which the law protects.*... Professors Harper and James suggest that the application of the doctrine is wholly artificial in most instances. [Citing Harper and James, The Law of Torts, 501 (1956 ed.)] *We therefore prefer to leave the rock-strewn path of 'negligent interference with contract' for more familiar tort terrain.* Cargill and Cargo Carriers argue broadly

that they suffered damage as a result of defendants' negligence and we will deal with their claims in these terms instead of on the more esoteric 'negligent interference' ground."

In the present case, Judge Cannella felt it would be presumptious to conclude that in *Kinsman II* this Court "*sub silentio* overruled *Robins*". However, given his "own attitude concerning the propriety of the *Robins* rule", he expressly "urge[d] the appellate courts to resolve the matter and provide direction to the district courts for the resolution of this and other similarly situated controversies" (21a).

Appellant respectfully submits that while this Court has not *sub silentio* "overruled" *Robins*, it has in effect recognized that the decision has no continuing vitality and would presumably not be followed by the Supreme Court today.

The Courts of Appeals in other circuits have reached a similar conclusion. Perhaps the most explicit departure from the *Robins* rule was that made very recently in *Chicago and Western Indiana Railroad Company* v. *The Buko Maru*, 348 F. Supp. 549 (N.D. Ill. 1972) (decision on damages not reported, but annexed hereto), aff'd 505 F. 2d 579 (7th Cir. 1974).

In *The Buko Maru*, several railroads operating under trackage agreements entitling them to use a bridge owned by another railroad sued to recover damages resulting from their loss of use of the bridge when it was struck by a vessel. Having found the vessel at fault, the District Court was called upon to determine the damage issues. Although the claim of the railroad that owned the bridge was not disputed, the BUKO MARU's owners vigorously challenged the

claims brought by three "proprietor" railroads which owned the stock of the bridge owning company, as well as the claims of three "tenant" railroads entitled to the use of the bridge under contracts with the other railroads.

At the very outset of its opinion, the District Court stated that "[t]he controlling rule of law . . . is whether the damages were reasonably foreseeable", a principle which, the Court added, "is laid down and thoroughly analyzed with respect to various categories of admiralty claims by Judge Friendly in *Petition of Kinsman Transit Co.* ["Kinsman I"] 338 F. 2d 708 (2d Cir. 1964), [*cert.* denied *sub nom. Continental Grain Co.* v. *City of Buffalo*, 380 U.S. 944 (1965)]." *The Buko Maru*, at p. 20, *infra*. Failing to comprehend why users of the bridge should be barred from recovering damages sustained as the proximate result of the vessel's wrongful act, Judge McMillen held that the "proprietor" and "tenant" railroads, "as persons with a proprietary *or a contractual right* to use the bridge" were thus entitled to recover damages resulting from the collision. *The Buko Maru*, at p. 20, infra.

In so holding, the District Court by no means overlooked *Robins*. Indeed, the BUKO MARU's owners had argued for application of the *Robins* rule by relying on *Louisville & Nashville Railroad* v. *Arrow Transportation Co.*, 170 F. Supp. 597 (N.D. Ala. 1959), wherein the claims of a "tenant" railroad were rejected because, in Judge McMillen's words, "[t]he court [there] found no 'proprietary' interest for recovery under [Title 46 U.S.C.] Section 740, purporting to follow Robins Dry Dock . . . and Alabama tort law". However, Judge McMillen in no uncertain terms rejected the *Louisville* decision (and the *Robins* principle followed therein), stating (at p. 22, *infra*):

> "We do not believe this case is sound law today, at least in Illinois, in view of the rather dramatic advances in tort liability which have occurred since Justice Holmes found no liability for the negligent interference with unforeseen contractual relationships."

The District Court's decision in *The Buko Maru* was unanimously affirmed by the Court of Appeals for the Seventh Circuit. 505 F. 2d 579 (7th Cir. 1974).

Like the damages sustained by the "proprietor" and "tenant" railroads in *The Buko Maru*, and unlike the damages of the parties whose claims were rejected in *Kinsman II*, Appellant's losses in the present case were the clearly foreseeable consequences of the MARATHONIAN's negligent navigation. If the ROLWI had been operated by her owners for their own account, it is settled law that they would have been entitled to their loss of profit during the detention period as part of their damages. Such loss of profit would have been just as foreseeable a consequence of the MARATHONIAN's fault as would physical damage to the ROLWI. This Court will, we believe, take judicial notice notice of the fact that today the practice of operating vessels under time charters is a very common one, and that time charter rates fluctuate widely. It was therefore plainly foreseeable that if the MARATHONIAN was navigated negligently she might collide with a vessel operating under a time charter, and that the time charterer might sustain damages because the market rate of hire at the time of the collision might be substantially greater than the "off-hire" allowed at the charter rate during detention for necessary collision damage repairs. Recovery of Appellant's damages for loss of contractual benefits would thus be fully warranted on grounds of foreseeability. As ob-

served in a note on the *Robins* decision in 36 Kentucky L.J. 142, 148 (1947-48):

> It is submitted, however, that there was negligence in the *Robins* case; that, although the defendant did not know of the specific contract at the time when the delay began, it should reasonably have anticipated that the vessel was being operated by some one other than the owner who would expect to make profits from the operation and who therefore has been harmed by the negligent performance of the contract. In the case of *Twitchell* v. *Nelson*, the court found that there was substantially an intent to interfere with a contract on this ground: "From a knowledge of such facts the law imposes the duty to inquire, and the failure to do so, either willfully or negligently, constitutes bad faith and the legal inference of actual knowledge is conclusive." The owner of the dry dock in the *Robins* case doubtless knew that ships were needed as soon as possible after repair in order to carry on commerce. It would seem reasonable to say that it knew, as the court stated in *The Argentino*, that ". . . a ship is a thing by the use of which money may be ordinarily earned, . . ." Having knowledge, then, that the ship was likely to be under contract, the defendant should have used reasonable care with regard to that contractual interest, and failing to do so, should have been held to be liable. If the Minnesota court in the *Twitchell* case was able to find an intention to interfere because of circumstances of which the wrongdoer should have taken notice, *a fortiori*, the Supreme Court could have discovered negligence on the part of the defendant in the *Robins* case. (Citations omitted).

Other decisions have likewise departed from the *Robins* rule. See, *e.g.*, *Union Oil Co.* v. *Oppen*, 501 F. 2d 558 (9th Cir. 1974); *In Re Lyra Shipping Co., Ltd.*, 360 F. Supp. 1188 (E.D. La. 1973), and *Carbone* v. *Ursich*, 209 F. 2d 178 (9th Cir. 1953). In the latter case, the Court of Appeals for the Ninth Circuit held that fishermen who had contracted with the owners of a fishing trawler for a share of the catch and who suffered monetary losses by reason of a collision caused by another vessel were entitled to recover from the latter's owners.

In *Aktieselskabet Cuzco* v. *The Sucaresco*, 294 U.S. 394 (1935), the owners of cargo shipped on a vessel which subsequently became involved in a collision were held entitled to recover from the other colliding vessel the amount of the contributions they were required to pay to the owners of the carrying vessel on account of expenses of a general average nature incurred by reason of the collision. The Supreme Court recognized that such recovery was not based upon any physical injury to the cargo, but arose directly from the tort sustained by the Vessel with which the cargo interests had contracted for the carriage of their cargo.

The trend toward allowing a recovery to one who has suffered economic loss as a result of negligent damage to the property of another is also evident in England. Thus, in *Spartan Steel and Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.*, 3 A.E.R. 557 (Court of Appeal 1972), Lord Denning, M.R., in referring to the grounds upon which such losses had formerly been disallowed (*i.e.*, that in the particular circumstances no duty of care was owed to the plaintiff, or that his damages were too remote), said:

> "I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable."

In the same case, a very persuasive dissenting judgment was delivered by Lord Justice Davies, who stated, at 3 A.E.R. 569:

> "My conclusion, as already indicated, is that an action lies in negligence for damages in respect of pure economic loss, provided that it was a reasonably foreseeable and direct consequence of failure in a duty of care."

The departure from the *Robins* rule evident from these decisions does not reflect sudden discontent with its application. As recognized by Judge Cannella in the present case and by Chief Judge Kaufman in *Kinsman II*, it has long been the subject of severe criticism by the leading commentators. Thus, in 1 Harper and James, *The Law of Torts* 501-505 (1956 ed.), the authors state:

> It is believed that many of the cases which purport to deal with this question and much of the literature which discusses them have misconceived the problem and have beclouded rather than clarified the issues. Indeed, in most instances, the problem of negligent interference with contract relations seems to be wholly artificial.
>
> Much of the confusion derives from the opinion of Justice Holmes in *Robins Dry Dock & Repair Company* v. *Flint*....
>
> With the emphasis . . . laid on the wrongdoer's knowledge or lack of knowledge of the contract, discussion of the *Robins* case has invariably been cast in the mould of negligent interference with contract relations. It is submitted that the issue of "knowledge" has been largely overemphasized on the one hand, and is largely irrelevant on the other.

In the first place, if "knowledge" were important, it is hard to understand why defendant should not be charged with knowledge that the plaintiff was or might well be a charterer entitled to the use of the vessel which he delivered to the dry dock to be repaired under a contract which the defendant had made with the owner. And if it be argued that the defendant would assume that the master of the vessel was acting for and on behalf of the owners, it might be a sufficient answer that such an assumption is hardly warranted in an industry where charter parties are common and vessels are, perhaps as frequently as not, operated by persons other than their owners. "Knowledge" of the existence of the contract or lack of it could hardly be decisive if the general principles of negligence are applicable. It should be enough to establish a prima facie case if the defendant, as a reasonable man, should have known of the likelihood of the existence of the contract and thereafter created an unreasonable risk of interfering with it. The analogy to negligent injury to persons is clear. Not only is it negligent to create unreasonable risks to persons whose presence is known but to those whom the actor has reason to expect in the area of his conduct and who thus may be exposed to the risk.

More important, knowledge on the part of the defendant that the ship was being operated by persons other than the owners would seem to be irrelevant, as having nothing to do with the defendant's primary liability. It is a long-standing rule of damages that recovery for damage tortiously caused to a chattel may include not only the cost of repairs but the value of the use of the chattel while it is undergoing repairs. A similar rule prevails in the case of damage to real estate which involves

> repairs and the loss of use. If there had been no charter party in the *Robins* case, there seems to be no doubt that the owner could have recovered for the loss of the vessel's use which resulted from the negligently damaged propeller. Again, if the damage had been done to the vessel while the charterer was in active operation of it, his recovery could be supported on analogy to old and unquestioned principles of law. The defendant should not be permitted to plead the jus tertii.

In a more recent article, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 Vand. L. Rev. 43, 55-57 (1972), Professor James again challenged the present vitality of *Robins:*

> It remains to be considered whether the present rule may be too broad—whether its sweep may exclude liability in some situations to which the pragmatic objection has no valid application. Take, for example, the case of a ship's charterer who loses its use, and even may have to pay hire, during the time when the ship is laid up for repairs necessitated by defendant's negligence. If there were no charter, the owner who lost the vessel's use could recover for that loss measured by its reasonable value. If the defendant were liable to the charterer instead, it would not be a wide and open-ended liability, but a finite one that the tortfeasor or his liability insurer would expect to pay under frequently occurring circumstances. There seems to be no valid reason why defendant should escape this ordinary item of damage just because the loss in this case happened to be suffered by one who had no proprietary interest in the ship. What has been called the pragmatic objection simply has no application. There are some practical—or "pragmatic"—difficulties, but they are

> of a different nature and a lower order of magnitude. There are questions of proper parties, of the proper measure of damages, of the protection of defendant against multiple vexation and double liability, and of protection of the settlement process. All these difficulties, however, are readily solvable by familiar procedural devices. The presence of both the charterer and owner as parties plaintiff in the suit could be required, and this would answer proper parties and multiple vexation questions. The measure of damages, in any event, should be limited to reasonable value. Settlement in good faith with either party should be held to bar the other on the very appropriate analogy from the law of bailment.

And in Prosser on *Torts* (4th ed. 1971) the author states, at 940:

> "No very satisfactory reason has been given for this refusal of a remedy in negligence cases. For the most part the courts have talked of "proximate cause," and have said that the consequences were too "remote". In all of the cases denying recovery the defendant had no knowledge of the contractual relation and no reason to foresee any harm to the plaintiff's interests; and this has led some writers to conclude that they do not mean that no negligence action could ever be maintained, but merely that there was no duty to the plaintiff in the particular instance. While this is very persuasive, it seems more likely that the courts are deliberately refusing to protect any contract against negligence, influenced by fear of an undue burden upon freedom of action, the relative severity of the penalty which may be imposed upon mere negligence, the possibility of collusive claims and increased litigation, and the difficulty of apportioning damages. If this is

> true, the question may at least be raised whether such a policy is not too narrow, and whether, as in the somewhat analogous case of the liability of the contractor himself to third parties, the law may not be expected to move in the future in the direction of recovery by those whose damages are foreseeable by the actor.

In summary, both the courts and the leading commentators on tort law have endorsed abandonment of the *Robins* rule in favor of the application of more familiar tort principles of negligence, causation and foreseeability. Allowance of a recovery by Appellant for the loss of its contractual benefits would be wholly consistent with decisions already announced by this as well as other Courts.

POINT II

The District Court erred in failing to find the allegations of the complaint sufficiently broad to encompass negligence so gross as to amount to intentional interference with the contractual relations between the owner of the Rolwi and appellant, as charterer of that vessel.

Even if this Court should find that the *Robins* rule remains valid, it should not have been applied in the present case, as the Complaint alleges an intentional tort, and not mere negligent interference with contractual relations.

On familiar principles, for the purposes of a motion to dismiss the allegations of the complaint must of course be accepted as true. *Brennan* v. *United States*, 129 F.Supp. 155 (D.Conn. 1954), aff'd 221 F.2d 120 (2d Cir. 1955). On equally well-settled principles, on such a motion the complaint must be viewed in the light most favorable to the plaintiff, and should not be dismissed unless it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support

of his claim. *Conley* v. *Gibson*, 355 U.S. 41 (1957); *Dioguardi* v. *Durning*, 139 F.2d 774 (2d Cir. 1944); *Knudsen* v. *The Torrington Company*, 254 F.2d 283 (2d Cir. 1958), citing 2 Moore, *Federal Practice*, 2245 (2d Ed. 1948).

While in the instant case the Complaint does not allege that the MARATHONIAN deliberately ran the ROLWI down, it does allege that the MARATHONIAN was proceeding at a highly excessive rate of speed in dense fog. Viewing the complaint in the light most favorable to Plaintiff, as the District Court was required to do, the allegation is broad enough to include negligence so gross that Defendants must be deemed to have intended its foreseeable consequences. Collision damage to another vessel and resulting economic loss to her time charterer were plainly foreseeable, and if Appellant proves the facts alleged in the Complaint, it should be permitted to recover damages for such economic loss.

CONCLUSION

The decision of the District Court dismissing the complaint should be reversed, with costs, and the case should be remanded to the District Court for trial in due course.

Respectfully submitted,

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CHICAGO AND WESTERN INDIANA RAILROAD COMPANY,

v.

MOTORSHIP BUKO MARU
(Nos. 70 C 2259, 70 C 1837)

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, E.D.

Decision on Damages

This cause comes on to be heard on motions of several railroads to intervene and the motions of all railroads to determine damages sustained by them as the result of defendant's collision with a bridge which they all used. The defendant Sanko S.S. Co. Ltd. no longer opposes intervention by the petitioning railroads, and those motions are hereby granted.

Liability of the defendant Sanko S.S. Co. Ltd., owner of the Motorship Buko Maru, was fixed by this court's Decision entered March 2, 1972 after a trial on that issue only. 348 F.Supp. 549 (N.D.Ill. 1972). Thereafter the parties entered into stipulations filed October 10, 1972 and March 9, 1973 settling the reasonable amount of damages sustained by each railroad excepting the Elgin, Joliet & Eastern. These stipulations involved a great amount of work by the attorneys and are gratefully approved and adopted by the court.

The issue to be decided at this juncture is which of the petitioning railroads is entitled to damages. The defendant Sanko does not dispute the claim of the owner railroad, plaintiff Chicago & Western Indiana Railroad Co. The

defendant does deny, however, that three railroads which own stock in the Chicago & Western Indiana R. Co. are entitled to damages (specifically the Chicago & Eastern Illinois, the Erie & Lackawanna, and the Monon). These are referred to as the "proprietor railroads"; the two other railroad owners of the Chicago & Western Indiana make no claim for damages. The defendant has also denied that three contract users of the bridge are entitled to damages. These are the Elgin, Joliet & Eastern, the Belt Railroad of Chicago and the Chesapeake & Ohio, referred to as the "tenant railroads".

The claimants base their complaints on 46 U.S.C. § 740 which was enacted in 1948. This section provides in pertinent part as follows:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consumated on land. In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done or consummated on navigable water...

This statute did nothing more than extend the reach of admiralty jurisdiction and did not take these claims out of that body of jurisprudence. Louisville & Nashville R. Co. v. Arrow Transportation Co., 170 F.Supp. 597 (N.D. Ala. 1959).

The legal title to the bridge is owned by the Chicago & Western Indiana R. Co., and the proprietor railroads own all of the stock of that railroad in equal amounts. The

Chicago & Western Indiana is not an operating railroad but merely owns the bridge and tracks which connect the bridge with points in Illinois and Indiana. All of its expenses and income (or losses) are distributed among the proprietor railroads, so that the Chicago & Western Indiana has no taxable income. See 26 U.S.C. § 281. Thus it is more in the nature of a title holding company or a mutual fund than it is a separate, legally distinguishable entity. We fail to see why its existence should stand in the way of the users of the bridge to collect for damages sustained as the proximate result of the Buko Maru's wrongful act. These claimants sue not as stockholders or as owners (except perhaps in a loose equity sense) but as persons with a proprietary or a contractual right to use the bridge pursuant to Federal laws and regulations.

The controlling rule of law in our opinion is whether the damages were reasonably forseeable. This principle is laid down and thoroughly analyzed with respect to various categories of admiralty claims by Judge Friendly in Petition of Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964). A ship broke loose during a flood and created havoc as it careened downstream. The court held that damages to a bridge, to adjacent landowners, and to the owners of ships and cargoes were properly recovered from the negligent parties. The court applied the proximate cause doctrine of Pa[illegible]af v. Long Island Railroad Co., 284 N.Y. 339, 162 N.E.2d 99 (1928) which we believe to be the sound approach. Later, however, in Petition of Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968) the court held on the same facts that the owners of ships which were blocked by the resultant ice jam and could not deliver their cargoes when scheduled could not recover because their damages were "too tenuous and remote".

There can be no question in the case at bar that the interruption of claimants' traffic was a foreseeable consequence of shutting down the bridge. This principle is not inconsistent, in principle, with the leading case of Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). Justice Holmes based this decision on the libellant's lack of protectible interest in a ship which was not ready for the libellant's charter, but his opinion relies heavily on the fact that the defendant did not know of the charter until after the damage was done. The court stated at 275 U.S. p. 308:

> The question is whether the respondents have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter. If they have, it must be worked out through their contract relations with the owners, not on the postulate that they have a right in rem against the ship.

The claims in the case at bar are also supported by Petition of Canal Barge Co., 323 F.Supp. 805 (N.D.Miss. 1971), affirmed, 480 F.2d. 11 (5th Cir., 71-2226, March 30, 1973). In that case, Terminal Railroad Association of St. Louis owned all the stock of the title holder of a bridge. Terminal recovered damages from a barge owner who caused the users to incur detour expenses. Terminal collected not only for its own expenses but for the expenses of its "customer" railroads who incurred detour expenses of various kinds. Relying on decisions other than the foregoing authorities, the court allowed recovery in admiralty by the claimant for all damages caused by the negligent barge owner. The distinction between proprietary and tenant railroads did not directly arise but the latter group recovered through Terminal.

Defendant relies on Louisville & Nashville Railroad v. Arrow Transportation Co., supra p. 3, which denied recovery to a tenant or mere user railroad. The court found no "proprietary" interest for recovery under Section 740, purporting to follow Robins Dry Dock, above p. 4, and Alabama tort law. We do not believe this case is sound law today, at least in Illinois, in view of the rather dramatic advances in tort liability which have occurred since Justice Holmes found no liability for the negligent interference with unforseen contractual relationships.

Defendant has raised other points involving possible double recovery, and the precise interpretation of the stipulation, but these are of no merit. We therefore find and conclude that all of the claimant railroads are entitled to recover and will enter a judgment in favor of each of them upon presentation of a proper order agreed to as to form. The question of interest and the amount of damages sustained by the Elgin, Joliet & Eastern is reserved for future decision.

This case will be called for a stauts report and presentation of a judgment order on Monday, June 25, 1973 at 10 a.m.

Enter:

/s/ THOMAS R. MCMILLEN
Judge, U.S. District Court

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